NO. 49566-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

K.M.,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David L. Edwards, Judge

BRIEF OF APPELLANT

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2. The juvenile court violated K.M.'s Fourteenth Amendment right to due process by making an order that is not amenable to judicial review.

> **ISSUE 1:** Due process requires a court to provide a statement of the evidence relied upon and the reasons behind an order revoking a suspended sentence. Did the court violate K.M.'s due process rights by revoking his SSODA without providing any oral or written findings of fact or conclusions of law?

3. The juvenile court violated K.M.'s Fourteenth Amendment right to due process by revoking his SSODA based on allegations for which he was not provided notice.
4. The written notice provided to K.M. of the allegations against him was too vague to satisfy due process.
5. The juvenile court erred by revoking K.M.'s SSODA.

> **ISSUE 2:** Due process guarantees an offender written notice of the claimed violations underlying an attempt to revoke a suspended sentence. Did the state and court violated K.M.'s right to due process by revoking his SSODA based on allegations for which he was not provided notice?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

K.M. was fifteen years old when he pleaded guilty to child molestation. CP 4-11.

The juvenile court sentenced K.M. under the statutory provisions for a Special Sex Offender Dispositional Alternative (SSODA). CP 14. His disposition of 15-36 weeks was suspended. CP 14.

K.M. moved in with his grandparents in Oregon and began treatment there at Parrott Creek through the Interstate Compact for Juveniles. *See* Ex. 1.

After about four months of treatment, the state moved to revoke K.M.'s SSODA. RP 80, 88; CP 34. The state alleged that he had "failed to follow recommendations of SSODA program." CP 34.

At a hearing on the state's motion to revoke K.M.'s SSODA, his probation officer and treatment provider testified that he had not been progressing in treatment as quickly as they would have liked. RP 88-89, 98. He was still in the beginning stages of taking responsibility for his actions. RP 93. His treatment provider thought K.M. needed a higher level of care: either residential treatment or treatment involving daily contact. Ex. 1, p. 23.

The state did not present any evidence that K.M. had failed to follow any of his treatment provider's recommendations, such as for evaluations, homework assignments, or polygraph examinations. The state did not present any evidence that he had violated the written terms of his SSODA.

The judge said that he would prefer for K.M. to attend residential treatment in the community, if possible. RP 113. But there was some confusion regarding whether that level of care was available to K.M. RP 111-113. The court continued the matter for the parties to investigate other treatment options. RP 114.

At the next hearing, the attorney for the state said that the residential treatment facility at Parrott Creek only takes referrals from Oregon's Youth Authority. RP 115.

K.M.'s attorney said that he had learned that K.M. would be able to enter residential treatment at Parrott Creek if Grays Harbor County established a contract with the program. RP 117.

The court responded as follows:

> Well, he was already at Parrott Creek and he violated the rules. He got kicked out. He's back here. He's going to JRA. Prepare the order on disposition. That's all.
> RP 118.

The court did not make any other oral ruling on the matter. RP 118. The court did not enter written findings of fact or conclusions of law. *See* CP *generally*.

This timely appeal follows. CP 39.

ARGUMENT

I. THE COURT VIOLATED K.M.'S RIGHT TO DUE PROCESS BY FAILING TO DELINEATE THE EVIDENCE UPON WHICH IT RELIED OR ANY REASONS FOR ITS DECISION, WHICH DEPRIVED HIM OF THE OPPORTUNITY FOR MEANINGFUL APPELLATE REVIEW.

In the context of parole and probation violations, Due Process requires, *inter alia*, "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *In re Blackburn*, 168 Wn.2d 811, 884, 232 P.3d 1091 (2010); U.S. Const. Amend. XIV.

Although oral rulings are acceptable (despite the language of *Morrissey* requiring a written statement) the Washington Supreme Court has encouraged trial courts to ender written findings to "prevent …unnecessary confusion." *State v. Dahl*, 139 Wn.2d 678, 689, 990 P.2d 396 (1999).

These "minimal requirements of due process" also apply to revocation of suspended sentences. *Id.*[1]

When a trial judge fails to set forth the factual basis for his/her decision, that decision is not amenable to appellate review, as required by due process. *Id.; State v. Lawrence*, 28 Wn. App. 435, 438, 624 P.2d 201 (1981).

Due process also requires that revocation of probation or a suspended sentence be based only on "verified facts." *Lawrence*, 28 Wn. App. at 438. The court must also articulate the evidence relied upon and the basis for its decision in order to ensure that this obligation is met. *Id.*

In K.M.'s case the court did not enter any oral or written findings of fact. RP 118; CP 38. The court did not specify the evidence upon which it had relied. RP 118; CP 38. In fact, the court did not even clarify which (if any) of the conditions of the SSODA it found K.M. to have violated. RP 118; CP 38.

The court failed its obligation to delineate the evidence it relied upon and reasons supporting its decision. Accordingly, the court violated K.M.'s right to due process by making a decision that is not amenable to judicial review. *Morrissey*, 408 U.S. at 489; *Dahl*, 139 Wn.2d at 689.

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[1] *Dahl* addresses revocation of a SSOSA sentence in adult criminal court, but the reasoning applies equally to revocation of a SSODA disposition in juvenile court.

Because the juvenile court did not clarify which allegations against K.M. it found to be true, this court is unable to determine whether the order revoking his SSODA is supported by substantial evidence.

Likewise, because the juvenile court did not specify the standard of proof it used when weighing the evidence, K.M. is unable to raise appellate issues regarding the standard that should be applied to the revocation of his SSODA.[2]

The court violated K.M.'s right to due process by failing to specify the evidence upon which it relied and the reasons for its decisions revoking K.M.'s SSODA. *Morrissey*, 408 U.S. at 489; *Dahl*, 139 Wn.2d at 689. The order revoking K.M.'s SSODA must be reversed. *Id.*

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[2] This problem is particularly stark because trial courts typically apply the "reasonably satisfied" standard of proof to revocation of SSOSA and SSODA suspended sentences, which, arguably, does not comport with due process. *See e.g. State v. Badger*, 64 Wn. App. 904, 908, 827 P.2d 318 (1992) (holding that a court must be 'reasonably satisfied' that a person violated a sentencing condition in order to find him/her in violation).

But the reasonable satisfaction standard is a relic from the days when due process depended on the distinction between a privilege and a right, rather than on whether the defendant would suffer a grievous loss of liberty. *See Escoe v. Zerbst*, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566 (1935) (holding that due process did not apply in probation revocation hearings because probation was a "privilege); *Morrissey*, 408 U.S. at 481 (more recently dispensing with the privilege / right distinction).

Washington State has appropriately abandoned the pre-*Morrissey* standard of proof in certain other types of revocation proceedings. *See* WAC 137-104-050(14) ("[t]he department has the obligation of proving each of the allegations of violations by a preponderance of the evidence" in community custody violation proceedings); *State v. McKay*, 127 Wn. App. 165, 168-69, 110 P.3d 856 (2005) (due process requires application of the preponderance of the evidence standard in DOSA revocation hearings).

If the juvenile court applied the "reasonably satisfied" standard of proof to revoke K.M.'s SSODA, it raises a significant legal issue for appeal. However, this court cannot address that issue because the juvenile court failed to provide any oral or written basis for its decision.

II. THE STATE VIOLATED K.M.'S RIGHT TO DUE PROCESS BY FAILING TO PROVIDE HIM WITH ADEQUATE NOTICE OF THE ALLEGED VIOLATIONS FOR WHICH IT SOUGHT TO REVOKE HIS SSODA.

The state provided K.M. with notice that it intended to ask the court to revoke his SSODA, claiming that he had had "failed to follow recommendations of SSODA program." CP 34.

At the revocation hearing, however, the state did not present evidence of any recommendation that K.M. had failed to follow. Instead, the state instead presented evidence alleging that K.M. had not made adequate progress in his four and a half months of treatment and needed residential treatment, which was not available in the community.

K.M. was deprived of his due process right to adequate notice of the allegations against him because the revocation of his SSODA was necessarily based on allegations for which he was not provided notice. *Blackburn*, 168 Wn.2d at 884.

A. K.M. was deprived his right to due process when the court revoked his SSODA for reasons unrelated to those for which he had received notice.

Due process guarantees the right to written notice of the claimed violations underlying an attempt to revoke a suspended sentence. *Morrissey*, 408 U.S. at 489; *Blackburn*, 168 Wn.2d at 884; U.S. Const. Amend. XIV.

To be adequate under *Morrissey*, such notice must "inform the offender of the specific violations alleged and the facts that the State will rely on to prove those violations." *Blackburn*, 168 Wn.2d at 885 (*quoting Dahl*, 139 Wn.2d at 685).

Such notice is required in order to give the offender enough information about the allegations to prepare a meaningful defense. *Id.*

Due Process does not permit the state to surprise the accused with a new legal theory at the time of the hearing: "[a]n offender whose liberty is in jeopardy should not be misled, subjected to guessing games, or asked to hit a moving target." *Id.* at 886.

Here, the state moved to revoke K.M.'s SSODA, alleging that he had "failed to follow recommendations of SSODA program." CP 34.

First, the notice provided to K.M. of the allegation against him was too vague to satisfy due process. *Id.* It did not allege any specific violation or any facts upon which the state planned to rely, as required by *Blackburn* and *Dahl*.

Second, the state did not present any evidence of any recommendation that K.M. had failed to "follow." There was no evidence, for example, that he had refused to complete polygraphs or other tests, had failed to finish homework assignments, or had missed too many therapy appointments.

Instead, the state's theory at the hearing was that K.M. had made generally inadequate progress in treatment and needed a higher level of care that was not available to him in the community. RP 110.

The state and court violated K.M.'s right to due process by revoking his SSODA based on allegations for which he was not provided notice. *Morrissey*, 408 U.S. at 489; *Blackburn*, 168 Wn.2d at 884.[3]

B. This Court should reconsider Robinson, which is incorrect and harmful

Division I has held in that a claim of insufficient notice in the revocation context is waived unless the accused raises it at the time of the hearing. *See State v. Robinson*, 120 Wn. App. 294, 299-300, 85 P.3d 376 (2004).

This court should reconsider and reject *Robinson* because it both incorrect and harmful. *State v. Trey M.*, 186 Wn.2d 884, 893, 383 P.3d 474 (2016) (precedent will be abandoned when it is incorrect and harmful).

[3] As outlined above, the juvenile courts failure to enter written or oral findings of fact or conclusions of law renders judicial review of its decision impossible for most issues. Regarding this notice issue, however, because the state did not even present any evidence of the violation for which is provided, notice, the court necessarily revoked K.M.'s SSODA for reasons other than those for which he was given notice. Accordingly, this court can review this issue despite the insufficient record created by the juvenile court.

The decision regarding waiver of a claim of insufficient notice in *Robinson* is based exclusively on citation to *State v. Nelson*. *Id. (citing State v. Nelson*, 103 Wn.2d 760, 697 P.2d 579 (1985)).

But *Nelson* addressed whether an accused person could waive a due process claim to the improper use of hearsay evidence at a revocation hearing, not whether improper notice could be raised for the first time on appeal. *Id.* at 766

Importantly, the *Nelson* court held that the accused in that case had waived any appellate claim regarding the hearsay evidence because he did not object below and *because he also relied on the hearsay evidence during closing argument. Id.*

Accordingly, the court's analysis in *Nelson* relies on the concept of invited error, rather than a true waiver. In contrast, here, a defendant cannot invite the error of insufficient notice from the state.

The hearsay issue in *Nelson* was also more similar to an evidentiary issue than to a notice issue. Evidentiary error can always be waived through failure to object in trial court. *State v. Blizzard*, 195 Wn. App. 717, 734, 381 P.3d 1241 (2016), *review denied,* 93707-9, 2017 WL 511917 (Wash. Feb. 8, 2017).

Additionally, constitutional claims regarding inadequate notice of the allegations against a person can, generally, be waived for the first time

on appeal. *State v. Goss*, 186 Wn.2d 372, 376, 378 P.3d 154 (2016); *State v. Porter*, 186 Wn.2d 85, 89, 375 P.3d 664 (2016).

While *Goss* and *Porter* address the right to notice of criminal charges, the consideration that inadequate notice renders the accused unable to prepare a proper defense applies equally in the revocation context. *See Blackburn*, 168 Wn.2d at 885.

Finally, defense counsel may not know the grounds upon which a court bases revocation of a suspended sentence until after the hearing, when the court enters written findings of fact and conclusions of law. As a result, defense counsel would be unable to object at the time of the hearing because s/he would be unaware of whether the court intended to rely on reasons or allegations beyond those provided in the notice to the offender.

The *Robinson* court erred by relying on *Nelson* to hold that improper notice of the grounds for revoking a suspended sentence could not be raised for the first time on appeal. The holding in *Robinson* is incorrect and harmful because it leaves offenders with no remedy for violations of the constitutional right to adequate notice of the grounds upon which the state seeks to revoke a suspended sentence. This is true even where, as in K.M.'s case, the notice renders the offender completely unable to prepare a defense to the allegations on which the revocation will

actually be based. This court should decline to follow Division I's decision in *Robinson* and consider K.M.'s notice claim for the first time on appeal.

CONCLUSION

The court violated K.M.'s rights to due process and to appeal by failing to set forth the facts upon which it relied or the reasons for its decision. The state and court violated K.M.'s due process right to notice of the allegations against him. The order revoking K.M.'s SSODA must be reversed.

Respectfully submitted on February 21, 2017,

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on February 21, 2017.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

ELLNER LAW OFFICE

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